STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company, AT&T Communications of Illinois, Inc. TCG Illinois, TCG Chicago, TCG St. Louis CoreComm Illinois, Inc., WorldCom, Inc. McLeodUSA Telecommunications Services, Inc. XO Illinois, Inc., Northpoint Communications, Inc. Rhythms Netconnection and Rhythms Links, Inc. Sprint Communications L.P., Focal Communications Corporation of Illinois, and Gabriel Communications of Illinois, Inc.	)	**Docket No. 01-0120**
Petition for Resolution of Disputed Issues Pursuant to Condition (30) of the SBC/Ameritech Merger Order	)	

REPLY BRIEF OF ILLINOIS COMPETITIVE LOCAL EXCHANGE CARRIERS

ON BEHALF OF

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

AT&T COMMUNICATIONS OF ILLINOIS, INC.

CORECOMM ILLINOIS, INC.

FOCAL COMMUNICATIONS CORPORATION

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

TCG CHICAGO, TCG ILLINOIS, TCG ST. LOUIS

TIME WARNER TELECOM OF ILLINOIS, LLC.

WORLDCOM, INC.

AND

XO ILLINOIS, INC.

October 18, 2001

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REPLY BRIEF OF ILLINOIS COMPETITIVE LOCAL EXCHANGE CARRIERS

Pursuant to the briefing schedule in this proceeding, the Association of Competitive Telecommunications Enterprises, AT&T Communications of Illinois, Inc., TCG Chicago, and TCG St. Louis ("AT&T"), CoreComm Illinois, Inc., Focal Communications Corporation, McLeodUSA Telecommunications Services, Inc., Time Warner Telecom of Illinois, LLC, WorldCom, Inc., and XO Illinois, Inc. (collectively, the "CLECs"), submit their post-hearing reply brief.

Many of Ameritech's arguments were anticipated in the CLECs' initial brief. In the interests of brevity, this brief will not rebut every Ameritech claim. The CLECs therefore ask the Commission to read this brief in tandem with their initial filing.

INTRODUCTION

Two visions of competition are presented in this case. One vision, advanced by the CLECs and Staff, envision a future where there are enforceable incentives that allow

Ameritech Illinois to provide adequate wholesale services. This incentive is not something "organic" to Ameritech. The necessary incentive comes from Commission adoption of a wholesale service remedy plan that provides the incentive to Ameritech to improve its dismal service quality. Ameritech's proposal, on the other hand, is "the same old, same old".

Unlike most other states, Illinois already has experience with a Plan that is similar to the one proposed by Ameritech. The results have been, to put it mildly, terrible. The Commission and the Administrative Law Judges ("ALJs") need to ask the following questions when examining the Texas Plan and the proposals advanced by Staff and the CLECs. *First,* has the existing plan properly incented Ameritech to provide adequate wholesale services to CLECs? *Second,* what is the state of competition today in Illinois? *Third,* do Illinois consumers deserve better than a rubberstamp of a rehashed deal made behind closed doors in Texas?

ARGUMENT

Ameritech Illinois's discussion on remedy plans is replete with inaccuracies and omissions. This reply brief will address the most egregious points.

I. THE TEXAS REMEDY PLAN WAS NOT THE PRODUCT OF INDUSTRY CONSENSUS.

Ameritech Illinois' brief notes repeatedly that state regulatory commissions in a handful of Southwestern Bell Telephone Company ("SWBT") states accepted a remedy plan similar to its proposal. Ameritech states that the plan was first accepted by the Federal Communications Commission ("FCC") in the SWBT Texas 271 application, and then state utility commissions in Kansas and Oklahoma used virtually the same plan (Ameritech Brief, pp. 1, 7-8).

Ameritech then asserts that the Texas plan was developed in a collaborative proceeding, and claims CLECs had input. (*See, e.g.,* Ameritech Brief, pp. 58-59). That contention is untrue.

CLEC Witness Dr. Michael Kalb personally participated in the portion of the Texas 271 proceeding addressing remedy plans. (Kalb Testimony, p. 21; Reply Testimony, p. 3). As Dr. Kalb discusses in his testimony, the Texas plan was negotiated between the former Chairman of the Texas Commission, selected members of the staff, and SWBT, an affiliate of Ameritech Illinois. The CLECs were ***forbidden*** by these parties from attending the operative meetings with SWBT, even as observers. (Kalb Testimony, p. 2). Those negotiations resulted in a remedy plan that contained provisions to which the CLECs strongly object, and which heavily are biased in favor of SBC/Ameritech.[1]

That is why SBC/Ameritech is promoting this plan in Illinois. If it were the result of a true "collaborative" effort, then at least some meaningful CLEC input would be reflected. As the record shows, not a single CLEC has ever supported the Texas Plan. (Dr. Kalb Reply, p. 3). Moreover, despite encountering unanimous opposition from public utility commissions and their staffs here and in Indiana, Michigan, and Wisconsin

[1] The only meaningful input by CLECs, ironically, was when the CLECs were forced to categorize what performance measurement should be afforded "low," "medium," and "high" priority for penalties. This is ironic, because the CLECs opposed in Texas – as they do here – the use of such an arbitrary and anti-competitive classification. By categorizing performance measurements as high, medium, and low priority, Ameritech Illinois effectively is choosing which CLEC entry strategies should be "favored" in terms of obtaining remedies. This prioritization allows Ameritech to target for discrimination particular CLEC business plans. Ameritech bizarrely cites to this unfair "process" with approval. (Ameritech Brief, pp. 58-59).

to significant portions of the Texas Plan, Ameritech has refused to make any substantive changes.[2] (Dr. Kalb Reply, pp. 3-4).

Ameritech's own witness acknowledged the one-sided way the Texas Plan was developed. Ameritech sponsored SWBT's lead employee handling the issue. Tr. p. 77.[3] When asked by the Administrative Law Judges how the "prioritization" scheme came about, Ameritech witness Dysart admitted this was created in private meetings between SWBT and the Texas PUC. (Tr., p. 78). More tellingly, when asked as to the level of CLEC input into the development of the "prioritization" scheme, Mr. Dysart stated: "The initial take at those were done, I believe, between Southwestern Bell and the Commission and the staff. We gave our input as to which ones were high, medium or low." It was not until after SWBT and the Texas PUC made their decisions that the CLECs were advised of the of the proposals and the provisions of the plan as it was ultimately implemented. (Id., p. 153).

As Dr. Kalb stated in his testimony, the Texas Remedy Plan is a clear example of how SBC views "collaboration"; that is, only two parties need participate for the exercise to become "collaboration", one of which necessarily is SBC, and CLECs may be excluded entirely. (Kalb Reply, p. 2).

II. SIGNIFICANT PORTIONS OF THE TEXAS PLAN HAVE BEEN REJECTED IN THE AMERITECH STATES.

As the CLECs and the Staff discussed in their initial briefs, the Texas Plan contains numerous fatal defects, rendering it useless to incent Ameritech to provide

[2] SBC foisting the Texas Plan upon its affiliate Ameritech, and indeed bringing in one of its Texas authors to testify here (Ameritech witness Dysart) is evidence of the baleful effects of SBC's takeover. (Dr. Kalb Reply, pp. 2-3)

[3] Indeed, illustrative of the unfair way the Texas Plan was crafted, CLEC witness Dr. Kalb never encountered Mr. Dysart in the collaboratives. Dr. Kalb Reply Testimony, p. 2.

adequate wholesale services. Moreover, Illinois' dismal experiences with the Plan also show the many inherent problems in the Texas Plan.

The many problems with the Texas Plan are recognized by *all* states that have had fair and open proceedings. The neighboring states of Indiana, Michigan, and Wisconsin have addressed adoption of a permanent remedy plan governing Ameritech. These states have refused to take the Texas Plan "off the rack", as Ameritech seeks here.

On November 9, 2000, the Indiana Utility Regulatory Commission ("IURC") established forty-four principles governing remedy plans.[4] The IURC then received three rounds of comments from interested parties on what remedy plan should be adopted, consistent with these principles. On September 11, 2001, the IURC issued a decision, modifying some of its principles, in part relying on a remedy plan adopted in the State of Colorado, and ordering the parties to meet on an expedited basis and try to craft a compromise remedy plan. The IURC, using the "skeletal structure" of the Texas Plan, recommends that any compromise remedy plan contain a number of modifications from the Texas proposal, including:

1) Eliminate the k-table exclusion on remedies;

2) Apply a multiplier for chronically deficient performance;

3) Ameritech should separately report and analyze affiliate data;

4) Use a procedural cap, not an absolute cap as the Texas Plan recommends, on the annual amount of remedies payable to CLECs; and

[4] Order, IURC Cause No. 41657.

5) Participation in the remedy plan automatically occurs twenty (20) business days after a letter of notification is sent from the CLEC to the IURC and Ameritech, with penalties accruing from the effective date.[5]

In Case No. U-11830, the Michigan Public Service Commission ("MPSC") adopted a remedy plan applying to Ameritech. The MPSC made the following changes to the Texas Remedy Plan:

1) granted the CLEC request to replace the absolute limit on remedy payments for per month and per CLEC limits to a procedural cap. If the cap is reached, the affected CLECs can file at the MPSC to get additional remedies;

2) committed to seriously consider requests made after three months to multiply remedy amounts if Ameritech offers poor wholesale service while only paying nominal remedies;

3) required Ameritech to compare its data to affiliate data and pay remedies if their affiliate is treated better than real CLECs, where there are more than 30 transactions in a month;

4) rejected Ameritech's proposal forcing CLECs to prioritize remedies, with all performance measurements having "medium" priority;

5) ruled that the cap on remedies (36% of revenues) is not absolute, as Ameritech wanted, but is "procedural";

6) threw-out Ameritech's proposal to lower remedies by having statistical testing on benchmarks; and

7) rejected the Texas Plan's other exclusions on liability, except for CLEC "acts or omissions" and the "k-table" exclusion on remedy payments.

By order dated September 24, 2001, the Public Service Commission of Wisconsin ("PSCW") established a remedy plan applying to Ameritech. The PSCW made a number of significant modifications to the Texas Plan, including:

[5] These modifications are derived from Attachment A to the IURC's September 11, 2001 Order. Other modifications are also contained in this 80-page document.

1) Rejected Ameritech's proposal to lower remedies by having statistical testing on benchmarks;

2) Eliminated the biggest exclusion on remedies in the Texas Plan, the so-called "K-table";

3) Required a comparison of Ameritech's retail and "CLEC" affiliates for purposes of establishing remedies;

4) Eliminated Ameritech's proposal to allow unilateral withholding of remedies because of their claim that CLECs are somehow acting in bad faith, and instead required Ameritech to first prove such an allegation;

5) Ruled that the existence of a remedy plan does not affect availability of other remedies and rights of the CLECs;

6) Rejected Ameritech's proposal forcing CLECs to prioritize remedies, with all performance measurements having "low" priority;

7) Rejected Ameritech's proposing forcing CLECs to amend their interconnection agreement to obtain remedies, and instead made the remedy plan immediately available upon PSCW adoption; and

8) Agreed with the CLEC proposal that Ameritech pay remedies to CLECs, not merely credit their account.

Nowhere in Ameritech's brief or its testimony, however, is there any acknowledgement that the Texas Plan been not been adopted in its "pure" form. Illinois should do no less than its Ameritech region regulatory brethren and craft a plan suited to competitive realities in Illinois.

III. IF THE JOINT CLEC PLAN IS NOT ADOPTED, THE COMMISSION SHOULD ADOPT THE STAFF REMEDY PLAN, WITH ONE CHANGE.

The Commission Staff, like its neighboring commissions, refuses to be buffaloed into rubberstamping the Texas Plan. The Staff proposes substantial changes to Ameritech's proposal:

> 1) End statistical testing for benchmark measurements, and adopt a "bright-line" standard;
>
> 2) Order Ameritech to adopt and employ an accurate critical values table;
>
> 3) Reject the use of the k-table exclusion on remedies;
>
> 4) Make all measurements of equal, "high" importance;
>
> 5) Procedural issues related to the overall level of penalties, such as whether the annual level should be an absolute maximum, what should happen if the annual level is reached within one year, and how the annual level should be determined each year;
>
> 6) Increase the per-occurrence penalty;
>
> 7) Extend the Condition 30 expiration date;
>
> 8) Adopt Parity With A Floor;
>
> 9) Increase the monthly caps; and
>
> 10) Convert penalty amounts to cash amounts.

If the Commission opts to adopt a plan other than that offered by the CLECs, the Staff proposal, supplemented with the balancing regime from the Joint CLEC Plan, does a far better job in preventing discrimination than the clearly ineffective Texas Plan.[6] (Dr. Kalb Reply, p. 28). While the Staff proposal certainly does not contain the safeguards

[6] The CLECs nevertheless prefer adoption of their plan to the one proposed by the Staff. The CLECs believe the Joint CLEC Plan provides the optimum incentive to Ameritech to provide adequate wholesale services to CLECs, and therefore that plan should be adopted.

inherent in the CLEC Plan, it does represent a compromise that considers and uses input from all the parties.

IV. THE CLEC PLAN IS COMPLETE AND READY TO BE IMPLEMENTED

Another theme paraded by Ameritech is the assertion that the Joint CLEC Remedy Plan "is riddled with gaps and inconsistencies", and therefore, the Joint CLEC Plan somehow is not operational. (Ameritech Brief, pp. 38-39). This contention is false.

First, as is demonstrated by the remedy analysis presented in the record, and summarized in the CLECs' initial brief, the Joint CLEC Remedy Plan is a complete, self-executing plan. Second, the CLEC Plan is **proven** to work in practice, as remedies have been calculated using Ameritech's proxy program, as CLEC Witness Dr. Kalb discussed in his initial testimony. (Dr. Kalb Testimony, pp. 38-50). If the CLEC Remedy Plan were "incomplete" as Ameritech asserts, how can remedies be calculated with specificity? Third, and most disturbing, is Ameritech's "hiatus of knowledge" on the statistical elements of the CLEC Plan.

In October, 2000, well before Ameritech's testimony were filed, CLEC Witness Dr. Kalb spoke and wrote at length with Dr. Chyhia Becker and Raymond Wolff, both of whom are consultants used by Ameritech on the remedy plan issue and gave extensive information on the Joint CLEC Remedy Plan, including the essential elements of the CLEC formula.[7]

[7] According to Dr. Kalb, the discussions with Ameritech touched on many statistical underpinnings of the CLEC Plan, including the use of the modified z score on submeasure cells as a simplifying yet valid estimator without the need for complicated truncation, how to calculate its balancing critical value, the meaning of the materiality parameter (delta), its effects on the results, why a single delta represents an enormous improvement over a fixed critical value (as used in the Texas plan) for emerging markets, and why one can specify the variational materiality (lambda) to unity without loss. See Dr. Kalb Reply, pp. 9-10.

The evidence here shows that Ameritech's statistical expert in this proceeding, Dr. Levy, had knowledge of these discussions many months prior to filing Ameritech's testimony. Dr. Levy admitted in Wisconsin hearings on the remedy plan issue that Dr. Becker and Mr. Wolff both work closely with him on preparing his testimony.[8] Further, Dr. Kalb offered detailed testimony in Wisconsin showing that virtually all of Ameritech's claims of missing information were in fact resolved in meetings with Dr. Becker and Mr. Wolff.[9] Thus, Ameritech's claims that the CLEC Plan is "riddled by gaps and inconsistencies" are incomprehensible. The Commission should ignore Ameritech's criticisms. They are simply not accurate, given the information Ameritech's personnel and consultants have in their possession for many months.

V. AMERITECH'S REMEDY PLAN DOES NOT CORRECTLY APPLY STATISTICAL ANALYSIS

1. K-Table

Ameritech argues at length that its proposed remedy plan uses standard statistical measurements, including the "k table" exclusion on remedies. Ameritech Brief, pp. 11-14, 24-31. Ameritech repeatedly cites to a 1998 affidavit filed by a former CLEC statistician, and states that since the Texas Plan also has a k table, that this somehow shows that the Texas Plan has merit.

This argument is both irrelevant and wrong. While the CLEC statistician Ameritech repeatedly cites is conveniently retired so he is unable to respond, a rebuttal is really not necessary. The document is from 1998, years prior to the implementation of the Texas Plan in Texas and Illinois. Thus, even if Ameritech is properly applying the

[8] Public Service Commission of Wisconsin Docket No. 6720-TI-160, Tr. Vol V, pp. 495-496 (December 1, 2000), cited in Dr. Kalb Reply, pp. 9-11.
[9] *Id.*

statistical methodology proposed in that affidavit, experiences in Illinois and Texas are the best guide on whether a plan similar to the one proposed by Ameritech here has properly incented the company to provide adequate wholesale services to CLECs.

In addition to real experiences showing the baleful effects of the "k-table", Ameritech's use of the 1998 affidavit is fundamentally misleading. In the interest of brevity, this brief will not repeat the initial CLEC filing where it was proved that the original Texas Plan and the similar Ameritech Plan misuse the k-table as originally proposed, and that real experience shows the k-table only exists as a way for Ameritech to evade remedy payments when poor wholesale service occurs. (CLEC Brief, pp. 36-45; *See, also,* Staff Brief, pp. 16-23).

2. Random Variation

Ameritech argues that its proposed statistical framework minimizes random variation, and hence protects the company from paying more in remedies. Ameritech Brief, p. 20-23. It is significant that this is Ameritech's initial statistical focus.

However, what is clear from Ameritech's brief is that the only random variation in which Ameritech has interest is random variation that may harm it. Random variation that helps Ameritech – and thus improperly decreases its remedy payments -- either is not addressed or is downplayed in importance. This is exemplified in the large component of Ameritech's Brief that deals with Type I error, while at the same time scant discussion is given to Type II error of the statistical tests.[10]

[10] The most obvious ways Ameritech discusses random variation only where it suits its interest in not paying remedies is its proposed use of the k table and statistical testing of benchmarks.

Ameritech's discussion also exhibits a fundamental misunderstanding of the statistical bases of the Texas Plan. First, the lack of participation by Ameritech's statistical expert, Dr. Daniel Levy, in the Texas 271 "collaborative" is exhibited in his analysis. Dr. Levy's reason for using the pooled statistics for proportions and rates is not the reason it was originally chosen in Texas. The pooled statistic exists because Texas PUC staff had noticed a problem when ILEC proportions were either zero or one and when ILEC rates were zero. In those cases the modified z score could not be computed. The pooled score can still almost always be computed. CLEC Witness Dr. Kalb has personal knowledge that this is true because Texas staff consulted him on this, albeit minor, issue. Dr. Levy's reasoning is off base. Dr. Kalb Reply, pp. 12-13.

Dr. Levy tries to support the use of the z test by making it appear that it is a well-known methodology, which it indeed is. However, the way Ameritech uses it, with a fixed critical value, is inappropriate for the kind of data CLECs are collecting from Ameritech's operating support systems ("OSS"). In order to control important sources of statistical error as fully as possible in such observational studies, a fixed critical value cannot be used with the z test. The critical z value, which gauges the random variation, must be chosen in a manner consistent with the quantity of data available in the observation. The Ameritech method does not do this. It fixes the Type I error at an unrealistically low value of 5% at the expense of allowing the Type II error to vary without limits. This lowers the power of the test compared to the balancing approach. In effect the fixed 5% Type I error makes it **harder** to detect discrimination in the data where it actually exists. Note that this self-stated guideline of the Ameritech plan is impeded by the use of a fixed 5% Type I error.

In summary, the use of a fixed critical value test is appropriate for controlled experiments performed in a laboratory, where scientists can repeat the experiment as many times as necessary to control all statistical errors. Ameritech's OSS data, however, is collected in the real world, not in a laboratory; thus there are additional sources of error due to sampling. To control this error a critical value must be chosen that minimizes the total error. The CLEC proposed balancing methodology is the solution to minimizing the total error. Dr. Kalb Reply, pp. 12-14.

Ameritech's discussion of Type II error analysis is also incorrect. Ameritech appears to have confused this issue and has no good reason to reject the use of Type II error analysis. (Ameritech Brief, pp. 20-24). The CLEC Plan defines the appropriate level of materiality and balanced Type I with Type II errors to produce an appropriate critical value. The fixed critical value methodology proposed by Ameritech takes no account of materiality at all. As a result submeasures tests with small sample sizes have low power (do not fail appropriately often) and submeasures tests with large sample size have too much power (fail more often than appropriate). Although the choice of materiality must come from other than statistical considerations, any given choice can be analyzed statistically, which is what we did for a number of materiality values, finally settling on a value of 0.25. Even though one could envision a set of materiality values defined for each submeasure, a universal materiality for all submeasures will still be more accurate than results obtained from using a fixed critical value. (Dr. Kalb Reply, pp. 15-16).

Ameritech also is incorrect in asserting that the Texas Plan's statistical methodology reduces the risk that a large disparity goes undetected for Type 2 errors.

(Ameritech Brief, pp. 21-24). Type II errors are enormous under the Ameritech methodology. Furthermore, the total error (both Type I and Type II) is shown to be smallest under the balancing methodology contained in the CLEC Remedy Plan.The choice of a 95% confidence as a supposed way to limit the error rate discussed by Ameritech is arbitrary and does not even allow for an accurate determination for all sample sizes.

Indeed, Ameritech's statistical methodology has the perverse effect of **increasing** the Type 2 error rate. Using Ameritech's coin flip example, while it is true the CLEC balancing proposal would raise Type I error to 16%, it would lower Type II error to 16% as well. In the Ameritech proposal, however, it can be shown that although the Type I error is 5%, the Type II error is at least 27%. This demonstrates the inherent unfairness of the Ameritech method. Furthermore, if there were less than 50 flips, Ameritech would still insist on their 5% confidence level; and the Type II error would jump quickly to an amount approaching 100% in the Ameritech scheme. Under balancing, no matter what the number of flips neither the Type I nor Type II error would go above 50% and would always be equal. (Dr. Kalb Reply, pp. 17-18).

Ameritech claimed in its testimony – and will undoubtedly echo that assertion in its reply brief -- that under the CLEC Remedy Plan remedies are paid even if service is in parity. Ameritech witness Dr. Levy complained that Ameritech is required to pay substantially more than the Texas proposal in remedies to CLECs under the Join CLEC proposal where Ameritech misses 8.6% of its performance measurement tests that are subject to Tier I remedies, and 23.9% on Tier II remedies. (Dr. Levy testimony, pp. 41-

44). Dr. Levy speculates that the CLEC remedies are too high in this instance, since, in his opinion, Ameritech is providing parity of service.

This contention shows the difference in philosophy between Ameritech, attempting to maintain its monopoly power and a competitive provider, attempting to get a toe-hold in the local market. To the monopolist, evidently, failing its performance measures 8.6% of the time somehow constitutes parity. Since when is 91.4% compliance parity? The total of $26.6 million for the month is for performance that is out of parity, not in parity. Moreover, the measures failed may not be "most" of them, but they very well could be business affecting, such as measures for installation and repair. (Dr. Kalb Reply, pp. 18-19).

Another defect with Amerietch's contention is how one defines "parity". Under the CLEC Plan, failure is assigned to Ameritech more often than it is assigning to itself. However, the Ameritech plan assigns parity on many more occasions when in fact it is discriminating. This, of course, is not a surprise, given the myriad layers of forgiveness built into the Texas Plan. The balancing method minimizes the total Type I and Type II error probabilities, while the Ameritech method simply fixes its Type I error probability at 5% without any regard to the size of the Type II error probabilities. Furthermore, a 5% Type I error is not conventional in these kinds of observational studies. Note that table 2 of Dr. Levy's testimony does not show the corresponding Type II error probabilities.[11]

[11] Ameritech would be embarrassed to show these numbers so Dr. Kalb did in his reply testimony. (See Kalb Reply at p. 26).

3. In Some Instances the CLEC Plan Calls for Smaller Remedies

Ameritech asserts in its brief that the CLEC Plan would result in remedies increasing. (See, e.g., Ameritech Brief, p. 60). Indeed, Ameritech makes its argument as if this alleged fact in and of itself was justification for rejecting the Joint CLEC remedy plan. Given the paltry remedies paid by SBC under the Texas plan for grossly disparate performance (as discussed by CLEC Witness Cox) shows that higher remedy payments are in fact in order to properly motivate Ameritech to improve its wholesale performance.

That being said, the factual premise of Ameritech's argument is, in fact, in error. The evidence – which includes Ameritech's testimony -- indicates that the CLEC Plan would, in some circumstances, cause remedies to decrease. (Ameritech witness Dr. Levy Testimony, pp. 49-51). First, Dr. Levy rebuts the (absurd) claim made by another Ameritech witness, Salvatore Fioretti, that the CLEC Plan exists as a way to create a revenue stream.[12] If that were the purpose of the CLEC Plan, it would not provide instances where it calls for smaller remedies than the Texas Plan.[13]

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[12] Perhaps the silliest argument made by Ameritech is the theory that CLECs would rather collect remedies than compete. (Fioretti Testimony, p. 24). Only a monopolist with little experience in the competitive market, like Ameritech, would ever concoct such a theory. There is far more money to be made competing than not competing and getting remedy payments. Ameritech's claim is nonsensical. In order for CLECs to collect maximum remedy payments, CLECs would have to place large numbers of orders with Ameritech, and Ameritech would have to fail dismally on every measure. This, in turn, would mean the CLECs would be perceived by their prospective customers as offering poor service, even if the real culprit is Ameritech. Under this scenario, CLECs would, over time, win fewer and fewer prospective customers, which would mean they would get less in remedy payments. Obviously, this dismal service would also mean the end for competition. (See Reply Testimony of CLEC Witness Karen Moore, p. 6).

[13] Ameritech argued in testimony that the CLEC Plan results in unduly high remedies. (Fioretti Testimony, pp. 24-27). Of course, in relation to the Texas Plan, which allows Ameritech to pay nominal remedies even where it offers chronically poor wholesale service, the CLEC Plan indeed allows for more substantial remedies. We know, of course, the Texas Plan is an utter failure to incent Ameritech to provide adequate service, as the CLECs discussed in the initial brief. (CLEC Brief, pp. 45-48). One need only examine the tragic deterioration in Ameritech's service since SBC took it over to determine that a more robust plan is necessary.

Second, the example provided by Ameritech witness Dr. Levy illustrates the fundamental fairness of the CLEC Plan. Under the CLEC Plan, remedies are not due in the example proffered by Dr. Levy simply because the threshold of materiality has not been reached. Ameritech has frequently argued that differences in retail and wholesale performance can be very small, especially with large sample size, and they would still have to pay remedies. Here we have an excellent example of how the CLEC plan is fair in its treatment to all parties. Large sample sizes imply large confidence in the test declaration. Therefore, the CLEC Plan allows for even smaller Type I and Type II errors than Ameritech does. It only makes sense that if the data can provide a greater confidence in the result, then we should take advantage.[14] (Dr. Kalb Reply, pp. 20-21).

4. The Remedy Plan Adopted by the Commission Should Use the CLEC Balancing Method Rather than the Fixed Critical Value.

Ameritech advocates use of a fixed critical value methodology rather than the balancing method proposed by the CLECs. (Ameritech Brief, pp. 31-40). The fixed critical value methodology, in contrast to the balancing method, not only also leaves open the potential for overly large Type I and Type II errors individually, the probability of enormous total Type I and Type II errors is <u>larger</u> in the fixed critical value approach than it is in the balancing approach. In the fixed approach advocated by Ameritech the Type I

[14] Ameritech witness Dr. Levy is inconsistent with the meaning of the concept of critical value. On the one hand he says that the measure is clearly out of parity and then he turns around to state that the balancing critical value would cause failure once in a billion times if the measure were in parity. These two statements have absolutely nothing to do with each other – the submeasure was declared in parity by the balancing method because there was enough data to do so. Ameritech declared it out of parity because its methodology is too crude to distinguish what real confidence we have in the data for this many sample points. (See, Dr. Kalb Reply, p. 21, fn 8).

error is supposedly fixed at 5% (In fact it is more like 4% under their plan.). The Type II error is completely uncontrolled and will always be higher, often much higher, then the Type II error of the balancing approach. If the concern is about potentially high error probabilities, the more problematic issue is the high Type II error probability of the fixed critical value methodology rather than the high probability of the balancing approach, which always and fairly assures that Type I and Type II error probabilities are equal whether they are large or small. Consider the following table that shows for an alternative hypothesis with a shifted mean of 0.25, the probabilities of Type I and Type II errors as a function of sample size for a fixed 5% scheme and the balancing method.[15] It is as a function of sample size that there is the greatest variation in error probabilities. (The use of a different shift value or different fixed critical value will not change the character of the table or our conclusions).

Sample Size		Type I Error Probability		Type II Error Probability	
		Fixed CV (1.645)	Balancing CV	Fixed CV (1.645)	Balancing CV
Low	10	5.0%	34.6%	80.4%	34.6%
Medium	50	5.0%	18.8%	45.1%	18.8%
	100	5.0%	10.6%	19.6%	10.6$
Large	300	5.0%	1.5%	0.4%	1.5%

[15] The CLECs used the (provable) fact that Ameritech processes lead to an underlying standard normal distribution of the modified z score under the null hypothesis of parity. As an alternative hypothesis, the CLECs assumed a univariate normal distribution of the modified z score. However, it is shifted toward worse performance by 0.25 standard deviation (the value of delta). Univariate normality is a very good assumption for a shift of this magnitude. Nevertheless, our conclusions would remain true over a very large range of reasonable alternative hypothesis distributions of the modified z-score. (See Dr. Kalb Reply, p. 25, fn 9).

Note first that for the fixed critical value Type I error probability never changes as a function of sample size (from 5%) by construction. However, note the value of the uncontrolled Type II error probability for the fixed critical value scheme. It is enormous (80.4% of the time discrimination will not be detected when it is there.) for low sample size and, going down the column, does not become comparable to the Type I error probability (5%) until sample size becomes well over 100 data points. For the smallest sample sizes (not shown) the Type II error probability will approach 100% in the fixed critical value scheme. On the other hand, at low sample size the balancing method gives a moderate Type I and Type II error probability (about 35% for each and will never greater than 50% for any sample size). Now, as sample size gets large all the error probabilities get small for all the error probabilities (as they should) except the Type I error probability of the fixed critical value scheme. It of course remains at 5%. This is unfair to Ameritech because the large sample sizes can actually support a lower Type I error (higher confidence than 95%). Balancing produces very reasonable error probabilities at the highest sample size shown (1.5%), and these error probabilities will continue to decrease monotonically with increasing sample size. I emphasize that when sample size gets large, all error probabilities get comparably small, except the fixed by construction value (5%) of the Ameritech plan. Finally, note in the table that under balancing, no matter what the sample size, the total of the Type I and Type II error probabilities is always smaller than the total of the probabilities under the fixed critical value scheme. This can be proved as a theorem. (Dr. Kalb Reply, pp. 25-27).

Moreover, the balancing method equates the <u>probabilities</u> of Type I and Type II errors, not any notion of the actual error of a given observation itself. To illustrate

consider for example, flipping a coin; the probability of heads as an outcome is p, while the probability of tails is 1-p. When we actually flip the coin a definite outcome occurs. For that flip, if heads occurred the probability becomes 1 for heads and 0 for tails. If tails occurred in the flip, the opposite would be true. There is no error of logic because the new probabilities are conditioned on the outcome of the flip, just as in CLEC methodology. Furthermore, it is perfectly legitimate to discuss the fairness of the coin and say that the coin will be fair if the probability of the heads outcome is equal to that of the tails outcome (i.e., p = 1-p = 50%). This is similar to what balancing requires. (Dr. Kalb Reply, p. 27).

Ameritech claims the balancing methodology proposed by the CLEC has not been approved by the FCC, any state commission in the region, and never has be part of any "peer-reviewed research journal, and is not available in any standard statistical textbook". (Ameritech Brief, pp. 33-34). Thus, Ameritech claims, the Commission should reject the CLEC balancing proposal.

Ameritech's claim is false. Unlike its fellow Bell Company, SBC/Ameritech, Qwest in its 14-state region proposes a CLEC-similar assessment methodology. This was the result of collaborative effects in the Regional Oversight Committee, and not the result of private meetings to which CLECs were excluded. The Commission should also review the Interim Decision in California, where a discussion of the balancing methodology is adopted. Finally, Bell South is proposing the use of balancing in all states of its footprint. (Kalb Reply, p. 28). Hence, support for the balancing methodology proposed by the CLECs here is gaining support across the country, and should be an integral part of the remedy plan adopted by the Commission here.

5. The Remedy Plan Should Not Have Statistical Testing on Benchmarks

Ameritech advocates adoption of statistical testing of benchmarks. (Ameritech Brief, pp. 40-41). Neither the Staff[16] nor the CLECs[17] (nor the states in this region that have already adopted remedy plans, namely Michigan and Wisconsin) allow Ameritech to wiggle out of paying remedies on benchmarks because of statistical testing. The use of statistics on predefined benchmarks is entirely inappropriate, as the CLECs discussed in their initial brief. The benchmark standards were designed with the underlying process fully in mind. This is another blatant attempt by Ameritech to reduce liability when it provides poor wholesale service.

VI. AMERITECH'S CRITICISMS OF PARITY WITH A FLOOR ARE UNFOUNDED.

"Parity with a Floor" is a concept that surfaced over the course of several months of performance measurement collaboratives in Illinois and four other states. Parity with a floor is a valid consensus attempt by the CLECs to fill a performance gap that is of critical concern. At the heart of the Telecommunications Act of 1996 are FCC rules intended to ensure fair local exchange competition. Non-discrimination and parity of retail versus wholesale are only components of the larger purpose. Competition in Illinois largely is dependent on Ameritech providing CLECs or wholesale providers service that their customers expect and, indeed, need. Ameritech, as the CLECs' Brief shows, is not even meeting old and in some cases outdated industry "minimum levels" of

[16] Staff Brief, pp. 23-26.
[17] CLEC Brief, p. 34.

performance for key measures that impact the CLECs' ability to compete and certainly alter customer's perceptions of new entrants. (CLEC Brief, pp. 26-30).

Ameritech also states that parity with a floor would create an opposing incentive for Ameritech to provide CLECs with superior quality service at the expense of Ameritech retail customers. (Ameritech Brief, pp. 44, 48-49).

Clearly, Ameritech has the responsibility to develop systems, and processes, and maintain force levels that are designed to serve all customers and to suggest that parity with a floor would be an incentive for them to alter those systems is beyond reason. This thinking suggests that instead of dedicating itself to achieve continuous improvement and proper staffing to stay above both retail and wholesale minimum floors, Ameritech would focus on avoiding potential remedies over fixing the problems that created the poor performance in the first place. Ameritech's thinking in this regard exemplifies the mentality of an incumbent monopolist. Apparently, Ameritech simply cannot conceive that it might actually have to **improve** its retail quality of service to attract and maintain a customer base. Obviously, Ameritech continues to believe its has such an advantage as the incumbent that it can continue to provide poor retail service and maintain its customer base. This thinking is exactly the opposite of the CLECs' intent for advocating parity with a floor. CLECs do not want superior service; they want to avoid inferior service for all customers now and in the future.

In any event, Ameritech's contention that the parity with a floor proposal will require it to provide better performance to CLECs than retail customers is incorrect. The level of service quality provided to retail customers by Ameritech remains exclusively under Ameritech's control, with or without parity with a floor. Parity with a floor simply

incents Ameritech to improve its retail service along with its wholesale service. In the absence of parity with a floor, Ameritech has every incentive to reduce its retail service quality to that of its wholesale service quality – in other words, to the lowest common denominator. Since by definition switching service to a CLEC automatically subjects the pool of CLEC end users to more chances for service issues than the pool of existing Ameritech retail customers (that do not have to make a change to their telephone service), the lowest common denominator approach of Ameritech discriminates in favor of Ameritech.

Moreover, Ameritech will not have to structure its processes to distinguish between wholesale and retail customers in order to implement parity with a floor. The CLECs have been receiving performance reports from Ameritech for many months. These reports show CLECs' performance compared to Ameritech retail performance, where appropriate. (See Testimony of CLEC Witness Cox, pp. 10-12 and 15-16 for illustrative examples). These are the same reports the CLECs would use to determine parity with a floor. Thus, there is no need for Ameritech to change its reporting, other than improve its completeness.

The objective of parity with a floor is not to distinguish between retail and wholesale performance, but rather to add an incentive to improve Ameritech's dismal performance for *all* of its customers in the most competitively neutral manner possible. At this point, it seems that the only customers Ameritech is willing to compensate for poor performance are retail customers. By what process do wholesale customers receive compensation? Certainly not from a remedy plan that includes only parity comparisons

that motivate Ameritech to lower its retail service performance to that of its wholesale performance level.

Ameritech argues that parity with a floor should not be adopted because of the ongoing workshops updating Code Part 730. (*See,* 83 Ill. Adm. Code 730, Standards of Service for Local Exchange Telecommunications Carriers). (Ameritech Brief, pp. 45-46). This contention is incorrect. Even if retail service quality credits are in effect -- as they will be under any revisions to Code Part 730 -- that does not eliminate the need for adopting the "parity with a floor".

The 17 specific parity measurements contained in the Joint CLEC Plan are essential. Unless the Commission adopted all 17 measurements through the Part 730 process, then adoption of retail service credits would fall short of what CLECs need. Moreover, there needs to be an adequate incentive in the form of a penalty to incent the ILEC to improve performance. Whether or not that additional incentive would exist through Part 730 is also not certain. Finally, there is no guarantee that Part 730 will be resolved in a timely fashion. Parity with a floor is a critical component of the remedy plan and it should be part of the plan itself. (Testimony of CLEC Witness Rod Cox, p. 15).

The Commission, therefore, should order the implementation of parity with a floor, as recommended by both the CLECs and Staff.

VII. ALL PARTIES, INCLUDING AMERITECH, RETAIN THE BURDEN OF PROOF FOR SUPPORTING THEIR RESPECTIVE POSITIONS

Ameritech raises the issue of which party maintains the burden of proof in this proceeding. (Ameritech Brief, p. 2; *See, also,* Staff Brief, pp. 5-7). Ameritech contends that any party suggesting a change to an "existing remedy plan" has the burden of proof.

In particular, Ameritech cites to a portion of Commission's SBC/Ameritech Merger Order which it asserts places the burden of proof on any party suggesting a change to performance measures, standards/benchmarks and remedies implemented as a result of the Commission's Merger Order. (Ameritech Brief, p. 2 (citing p. 260 of the SBC/Ameritech Merger Order).

The inference of Ameritech's argument is that it has no burden whatsoever, but that is simply not the case. As Staff correctly notes, Ameritech is the party bound to comply with the SBC/Ameritech Merger Order and Ameritech is the only party identified in Condition 30 with the burden of implementing a remedy plan.[18] (Staff Brief, p. 7). Joint CLECs agree with Staff that the SBC/Ameritech Merger Order firmly casts the burden of persuasion upon Ameritech of proving that propriety of its plan and persuading the Commission that its plan should be adopted.

The Joint CLECs agree with Staff's assessment that the Commission has not removed the burden of persuasion from any party to this proceeding. Rather, each party retains the burden of supporting its own position. (Id., p. 6). This application of the burden is consistent with Illinois law and is particularly consistent with the fact that all parties, including Ameritech, initiated this proceeding pursuant to a joint petition. Ameritech's suggestion that it alone retains no burden is unreasonable and inconsistent with the SBC/Ameritech Merger Order and Illinois law. Accordingly, the Administrative

[18] Indeed, subsequent to the implementation of agreed to standards and benchmarks, the Commission directed SBC/Ameritech to "also implement (subject to any required Commission approval, which will be timely sought) any remedy to be associated with such agreed to Standard/Benchmark consistent with the approach used in the Texas collaborative." SBC/Ameritech Merger Order, p. 259. No Commission approval was obtained for what Ameritech refers to as the "existing plan."

Law Judges ("ALJs") and the Commission should require all parties, including Ameritech, to sustain the burden of proof in supporting their respective positions.

VIII. DURATION OF THE REMEDY PLAN

Ameritech argues that that the Commission has already decided that Condition 30 and duration of the performance measures and a remedy plan associated with the measures will expire and no longer be binding three years after the merger closing date. (Ameritech Brief, p. 67). While Ameritech says that it "intends" to have performance measures and a remedy plan in place after October 8, 2002 (the three year anniversary of the SBC/Ameritech closing, it suggests that the appropriate means to achieve that result is through a Commission proceeding examining Ameritech's entry into the in-region long distance business. (Id.) According to Ameritech, Condition 30 and the remedy plan were "part of a deal between Ameritech Illinois and the Commission, and it would be improper for the Commission to unilaterally change that deal." (Id., p. 68).

First, it is not at all clear that the Commission determined that the performance measures and a remedy plan should expire at all. The Commission recognized that establishment of the performance measures and an appropriate remedy plan would be an on-going process that could be reviewed and changed by the agreement of the parties and where disputes exist the Commission would resolve those disputes. As the Commission noted:

> For a minimum of one year following the Merger Closing Date, and thereafter on an as-needed basis as determined by Staff, participants in the collaborative process will collaborate to implement any additions, deletions, or changes to the performance measurements, stands/benchmarks, and remedies that are implemented by SBC/Ameritech in Illinois. Any participant may propose such addition, deletion or change based upon experience with such implemented performance

> measurements, standards/benchmarks or any other factor. If a dispute over any such addition, deletion, or change cannot be resolved through the collaborative process, any participant may ask the Commission to resolve such dispute. The participant proposing the addition, deletion or change shall have the burden of proving that such addition, deletion or change should be adopted in Illinois.

SBC/Ameritech Merger Order, Condition 30, paragraph 11, page 260 (emphasis added).

The language of the SBC/Ameritech Merger Order clearly contemplates the performance measure and remedy plan process would be on-going and subject to changes during the duration of Condition 30. Condition 30 is merely the procedural vehicle for ensuring that the performance measure and an appropriate remedy plan are implemented. While Condition 30 may expire October 9, 2002, that does not mean that the performance measurements and remedy plan implemented pursuant to Condition 30 expire.

The same rationale applies to other conditions. For example, Condition 29 is the vehicle for getting Operations Support System ("OSS") enhancements and system upgrades implemented. Like the performance measurements and remedy plan requirement, OSS commitments are on-going. If the ALJs and the Commission were to accept Ameritech's argument, then Ameritech could presumably remove all of the OSS enhancements and system upgrades that it implemented as a part of Condition 29. Such a result would be absurd.

For these reasons, the Joint CLECs submit that the language of the SBC/Ameritech Merger Order does not reflect an intent that the performance measures and the remedy plan disappear three years after the Merger Closing Date. Nevertheless, to the extent that the ALJs and the Commission are inclined

to give Ameritech's argument any credence, it is clear there is a dispute about that piece of the plan – a dispute that Staff and the Joint CLECs are asking the Commission to resolve here.

While October 9, 2002 is rapidly approaching – it is less than one year away – a final Commission-approved remedy plan has yet to be implemented. It is inconceivable that the Commission intended an remedy plan that it finds to be appropriate to be in place well less than one-year. Indeed, if that is the case, this proceeding will have been a giant waste of the resources of the Commission, CLECs and Ameritech. For all of the foregoing reasons, the Joint CLECs agree with Staff that performance measures and a remedy plan must survive beyond October 9, 2002. (See Staff Brief, pp. 43-44). The Joint CLECs respectfully submit that the Commission determine that Ameritech's performance measures and the remedy plan it finds appropriate as a result of this proceeding should remain in full force and effect unless and until the Commission determines otherwise.

CONCLUSION

As shown here and in the CLECs' initial brief, the Commission should adopt the Joint CLEC Remedy Plan. In contrast to the Texas Plan, which has proven an abject failure, the Joint CLEC Plan will provide the necessary incentive to Ameritech to provide adequate wholesale services to CLECs. In the alternative, if the Commission rejects the Joint CLEC Plan, the CLECs support adoption of the Staff Remedy Plan, with the additional use of the balancing statistical methodology.

Respectfully submitted,

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